Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-299

JAMES ROBERT BURRUS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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No.

JAMES ROBERT BURRUS,

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-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

James Robert Burrus, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on July 23, 1979.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit entered on July 23, 1979 is unreported and is printed in Appendix A hereto, infra, page 17. The order of the United States Court of Appeals for the Ninth Circuit entered on June 19, 1979 is unreported and is printed in Appendix A hereto, infra, page 18. The judgment of the United States District Court, District of Arizona, entered December 22, 1978, is printed in Appendix A hereto, infra, page 19.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page 18) was entered on June 19, 1979. The Court considered Petitioner's response to a motion to dismiss the appeal as a motion for rehearing and denied same on July 23, 1979 (Appendix A, infra,

page 17). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether Petitioner's appeal may properly be dismissed when he has been diligent in pursuing said appeal and where all delay has been the responsibility of an employee of the Court, to-wit: a court reporter.

II. Whether Petitioner's appeal may properly be dismissed where the Petitioner has failed to obey an order of the United States Court of Appeals for the Ninth Circuit to report to the United States Marshal in Phoenix on a thrice-weekly basis.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment of the Constitution of the United States, which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of

> a grand jury, except in cases arising in the land or naval forces, or in the malicia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner, James Robert Burrus, was convicted of violations of 18 U.S.C. §153 on December 14, 1978. On that same date, he filed a notice of appeal of his conviction to the United States Court of Appeals for the Ninth Circuit. Petitioner's appeal would have raised a number of substantial questions for review by the Court of Appeals. These include: (1) that it was error for the trial judge to deny Defendant's motion to dismiss the grand jury indictment because there was an unauthorized person in the grand jury room

while evidence was being presented to the grand jury, the U. S. Attorney failed to present exculpatory evidence to the grand jury, and the U. S. Attorney read the superseding grand jury the prior testimony of Petitioner, James Robert Burrus, solely for the purpose of prejudicing the Petitioner in the eyes of the grand jury in violation of ABA Standards; (2) it was error for the trial judge to admit the grand jury testimony of a witness, even though admittedly unavailable for trial, because Petitioner had no opportunity to cross-examine said witness at the grand jury proceedings; the admission of that prior testimony clearly violates Rule 804(b)(1) of the Federal Rules of Evidence; (3) it was error for the trial judge to admit into evidence numerous documents which were admitted without proper foundation; (4) it was error for the trial judge to deny Defendant's motion

to suppress identifications; (5) it was error for the trial judge to deny Defendant's motion to suppress all of the government's evidence. Pursuant to the order of that Court, entered December 22, 1978, the Defendant was released on bond pending his appeal. From the date of the filing of the notice of appeal until March 16, 1979, three different orders for time schedule on the prosecution of this appeal were received from the United States Magistrate. The final order for time schedule provided that the record was to be transmitted to the United States Court of Appeals for the Ninth Circuit by April 5, 1979. In addition, the Petitioner's opening brief, according to this order, was to be served and filed by May 15, 1979. On May 18, 1979, Petitioner filed a motion for extension of time based upon the affidavit of one Florence Carcia, court reporter, wherein she swore that her

transcription of the record of Petitioner's trial would not be completed until the 16th day of July, 1979, a delay which is in no respect attributed to the Petitioner.

On May 16, 1979, Respondent, United States of America, by Dale A. Danneman, Assistant United States Attorney, filed a motion to dismiss appeal. The motion to dismiss appeal was based upon the grounds that Petitioner had failed to comply with the Order for Time Schedule of the United States Magistrate, and that Petitioner had failed to obey an order of the United States Court of Appeals to report to the United States Marshal in Phoenix on a thrice-weekly basis. On June 19, 1979, that Court granted the motion to dismiss the appeal and denied Petitioner's motion for an extension of time. On July 23, 1979, the United States Court of Appeals for the Ninth Circuit, having construed Petitioner's response to the motion to dismiss the appeal as a

motion for rehearing, denied the motion for rehearing. In neither case did that Court prepare an opinion. So it must be assumed that the grounds stated in the motion to dismiss were those upon which the appeal was dismissed.

REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER HAS BEEN DILIGENT IN PURSUING THIS APPEAL AND HAS NOT BEEN RESPONSIBLE FOR ANY DELAY OF THE PROCESS.

On May 18 of this year, Petitioner filed with the United States Court of Appeals for the Ninth Circuit a motion for extension of time. Annexed to that motion was the affidavit of the court reporter at trial, Florence Carcia, a copy of which Petitioner attached to his response. Petitioner paid for the transcript of the court reporter in a timely fashion. However, circumstances beyond the control of the Petitioner resulted in the destruction of the transcript which was being

finalized by said court reporter. In her affidavit to the Court, said court reporter stated that the transcription of the record would be completed by the 16th day of July, 1979.

Without the benefit of a copy of the record, Petitioner was unable to prepare any briefs for the appeal. Petitioner has been diligent and has pursued the course of the appeal to the extent that he has been able. He has conformed to all other requirements. The only remaining requirement is that his briefs be timely filed. Due to no lack of diligence on his part, the transcript has been unavailable. Upon receipt of the transcript, within a reasonable time for preparation, Petitioner would have filed his opening brief.

II. CERTIORARI SHOULD BE GRANTED TO FURTHER JUDICIAL ECONOMY.

Case law indicates that a dismissal of this appeal was discretionary to the

Court. In 1968, the United States Court of Appeals for the Ninth Circuit held that the government's motion to dismiss the appeal on the ground that appellant "has jumped bail and is a fugitive" would be denied. Lannon v. United States, 410 F.2d 504 (9th Cir. 1968).

Petitioner has arguably committed an additional crime in that he has failed to present himself thrice weekly to the U. S. Marshal, violating an order of the Court pertaining to his bail restrictions. He ultimately will be charged with said violation and appropriately punished. It is, however, the intent of the Respondent in the context of the instant case to further punish the Petitioner beyond his ultimate punishment for violation of bail restrictions. Clearly, the two are divisible. If the appeal of the Petitioner is of a meritorious nature, it should be heard. If it is of a frivolous nature, then the

Court should have exercised its perogative and denied the appeal rather than dismiss the appeal on the aforestated grounds. A quick perusal of the record will indicate that Petitioner's appeal is based on meritorious grounds. In fact, the expectation of reversal in the instant case is much higher than one might normally predict.

There is little question that Petitioner will ultimately return to the jurisdiction of the Court of Appeals. Since Respondent's motion to dismiss has been granted, Petitioner will move to reinstate his meritorious appeal at the time he returns. At this time, it is impossible for the Court to determine the merit of a motion to reinstate. The United States Court of Appeals for the Ninth Circuit, however, is able to determine the merits of the appeal now.

Judicial economy would dictate that the Writ of Certiorari be granted, that

the United States Court of Appeals for the Ninth Circuit hear Petitioner's appeal, rather than later hear a motion to reinstate, then reinstate the appeal and then finally rule on the merits of the appeal.

III. APPELLATE REVIEW MUST BE KEPT FREE OF UNREASONED DISTINCTIONS THAT CAN ONLY IMPEDE OPEN AND EQUAL ACCESS TO THE COURTS.

A dismissal of Petitioner's appeal employs a hard sanction, the severity of which raises the question as to its equal application in all cases brought before this Court and the question of the abrogation of Petitioner's fundamental right without due process of law. Since the appellate review process exists, equal access to criminal appeals is a fundamental right. Which "One established . . . must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." Rinaldi v. Yeager, 38 U.S. 395, 86 S.Ct. 1497, 1500, 15 L.Ed.2d

577 (1966).

It is only the unreasonable classification, not the practice of dismissing or reinstating appeals of escapees, that is objectionable. It is within the power of the appellate court to decide appeals of defendants who escape and refuse to submit to the control of the court below. See Molinaro v. New Jersey, 396 U.S. 365, 80 S.Ct. 498, 24 L.Ed.2d 586 (1970); Bonahan v. Nebraska, 125 U.S. 692, 8 S.Ct. 1390, 31 L.Ed. 854 (1887); Smith v. United States, 94 U.S. 97, 24 L.Ed. 32 (1876).

Such a practice may be administratively prudent and there is no constitutionally set rule for when dismissal should be made. In Smith, supra, the Court dismissed the case at the beginning of the docket at the end of which it arose. In Molinaro, supra, the case was dismissed without waiting for "the end of the term or the expiration of a fixed period of time". 395 U.S. at 366.

And finally, in Van Blaricom v. Forscht, 490 F.2d 461 (5th Cir. 1974), the Court removed the appeal from the docket and ordered that if it was not made known to the Court within thirty (30) days that the appellant was available and subject to judgment, his appeal would be dismissed. Dismissal or reinstatement of the appeals of escapees should be based on an established and strictly followed policy.

In Smith, supra, the Court articulated the rationale for the dismissal of an appeal when the appellant is at large:

> "[I]t is clearly within our discretion to refuse to hear a criminal case in error unless the convicted party suing out of the writ is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped. . . . Under such circumstances we are not inclined to hear and decide what may prove to be only a moot case." 94 U.S. at 97, 24 L.Ed. at 32.

This rule is discretionary to the Court of Appeals but insofar as mootness is con-

cerned, it is clear that Petitioner will ultimately suffer the consequences of the decision rendered by the Court. There is little question that he will eventually once again be within the jurisdiction of that Court. At such time, the decision of the Court of Appeals will be moot only if the Court's granting of Respondent's motion to dismiss is allowed to stand; and it will remain moot until said time as that Court reinstates the appeal. Should no reinstatement occur, then the mootness would continue. It would seem the better rule to allow the natural processes of the appeal to continue. If the appeal is not worthy of review, if the appeal is not meritorious, if the appeal does not unveil error on the part of the district court, or on the part of the grand jury, then it should be affirmed but if the aforementioned are present, then it should be reversed. Petitioner has a fundamental

right to a review of his appeal. If the order of the United States Court of Appeals for the Ninth Circuit dismissing the appeal be allowed to stand, it effectively deprives Petitioner of his fundamental right to an appeal and his property interest in the paid-for transcript without hearing.

CONCLUSION

Wherefore, Petitioner, James Robert Burrus, respectfully prays that a Writ of Certiorari be granted on the grounds that he has diligently pursued the appeal process, and on the grounds that the dismissal of his appeal deprives him of a fundamental right without due process of law.

RESPECTFULLY SUBMITTED

MICHAEL D. KIMERER
707 Security Building
234 North Central Ave.
Phoenix, Arizona 85004

August 21, 1979

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3706
	)	
-vs-	)	DC# CR 77-159 MR
	)	Arizona (Phoenix)
JAMES ROBERT BURRUS,	)	
	)	ORDER
Defendant-Appellant.	)	
	)	

Before: TRASK and KENNEDY, Circuit Judges

Construing appellant's response to the motion to dismiss the appeal of June 21, 1979 as a motion for rehearing, the motion for rehearing is denied.

Filed July 23, 1979
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 78-3706
	)	
-vs-	)	DC# CR 77-159
	)	Arizona (Phoenix)
JAMES ROBERT BURRUS,	)	
	)	O R D E R
Defendant-Appellant.	)	
	)	

Before: TRASK and KENNEDY, Circuit Judges

Upon consideration of appellee's motion to dismiss the appeal and appellant's motion for an extension of time in which to file his brief, the motion to dismiss the appeal is granted, and the motion of appellant for an extension of time within which to file his brief, is denied.

Filed June 19, 1979
Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR-77-159 PHX
-vs-	)	JUDGMENT AND COMMITMENT
JAMES ROBERT BURRUS, Defendant.	)	

On this 14th day of December, 1978, at Phoenix, Arizona, came the Attorney for the Government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 18, United States Code, Section 153 (Embezzlement from Bankrupt Estate) as charged in Counts 1, 3, 4, 6, 8, 9, 13, 14 and 15 and Title 18, United States Code, Section 2314, (Interstate transportation of stolen securities) as charged in Count 2, 5, 7, 10 and 12 of the Superseding Indictment.

The Court having asked the defendant wehther he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period as indicated below:

COUNT NO.	YEARS	FINE	
1	5	$ 5,000.00	
2	7	10,000.00	
3	5	5,000.00	Suspended
4	5	5,000.00	Suspended
5	7	10,000.00	
6	5	5,000.00	
7	7	10,000.00	
8	5	5,000.00	Suspended
9	5	5,000.00	Suspended

COUNT NO.	YEARS	FINE
10	7	$ 10,000.00
12	7	10,000.00 Suspended
13	5	5,000.00 Suspended
14	5	5,000.00 Suspended
15	5	5,000.00 Suspended

Sentences in Counts 1, 2, 3, 4 and 5 shall run concurrently with each other and not consecutively to each other.

The sentence in Counts 6, 7, 8, 9, 10, 12, 13, 14 and 15, the defendant shall be confined to a jail-type institution for the first six months of the terms that are here imposed and the term of the imprisonment only as to the balance of the imprisonment shall be suspended and the defendant placed upon probation for a period of five (5) years on the following terms and conditions: That he obey all local, state, and federal laws: that he comply with the rules and regulations as ordered by the Probation Office. The sentence in counts

6, 7, 8, 9, 10, 12, 13, 14 and 15 shall run consecutive to and not concurrent with the sentence imposed on Counts 1, 2, 3, 4 and 5, of the superseding indictment.

The bond of the defendant is exonerated. The defendant is to remain in the custody of the Court.

/s/ Manuel Real
UNITED STATES DISTRICT JUDGE

Dated: December 18, 1978.

Supreme Court, U. S.
FILED
OCT 2 1979
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No. 79-299

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES ROBERT BURRUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-299

JAMES ROBERT BURRUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on 14 counts of embezzlement from a bankrupt estate, in violation of 18 U.S.C. 153, and interstate transportation of stolen securities, in violation of 18 U.S.C. 2314. He was sentenced to a term of seven and a half years' imprisonment, to be followed by five years' probation, and was fined $50,000 (Pet. App. 19-22).

Petitioner appealed his conviction to the United States Court of Appeals for the Ninth Circuit. On May 16, 1979, the government moved to dismiss the appeal for lack of prosecution and because petitioner had fled the jurisdiction of the court. On June 19, 1979, the court of appeals granted the government's motion (Pet. App. 18). Petitioner filed an untimely response to the government's motion, which the court of appeals construed as a motion for rehearing and denied (Pet. App. 17).

Petitioner concedes that he is a fugitive (Pet. 10-11) but nevertheless claims (Pet. 9-16) that the court of appeals should not have dismissed his appeal. As a fugitive, however, petitioner is not entitled to call upon the court of appeals (or this Court) for determination of his claims, and dismissal of the appeal was within the court of appeals' admitted discretion (Pet. 9-10). See *Molinaro* v. *New Jersey*, 396 U.S. 365 (1970), and cases there discussed.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

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[1]Because dismissal of the appeal was proper following petitioner's flight, there is no need for this Court to consider petitioner's additional argument (Pet. 8-9) that his failure to prosecute the appeal was caused by the destruction of the court reporter's transcript of the trial. In any event, we note that petitioner had failed to comply with repeated orders to transmit the record to the court of appeals, the latest of which required transmittal by April 5, 1979 (Pet. 6), and the transcript was not destroyed until April 15, 1979 (Affidavit of Florence Carcia, Court Reporter, attached to petitioner's motion for extension of time in the court of appeals).

Nor is there merit to petitioner's argument (Pet. 12-16) that dismissal of the appeal denies him due process of law. See *Molinaro* v. *New Jersey*, *supra*. Furthermore, as petitioner recognizes (Pet. 15), he may move for reinstatement of his appeal if and when he surrenders himself or is apprehended.

DOJ-1979-10